No. 93-1204

In the Supreme Court of the United States

OCTOBER TERM, 1993

LARRY S. EAGLEYE, PETITIONER

v.

TRW, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court improperly relied on sealed materials submitted to it in finding that petitioner's first *qui tam* lawsuit had to be dismissed under the applicable statutory provisions because his complaint was based on information already in the government's possession at the time the suit was filed.

2. Whether the fact that the government already had the information on which this *qui tam* action was based at the time petitioner commenced this action is sufficient to establish that petitioner is not entitled to an informer's fee for bringing the action, under a now-superseded version of the *qui tam* provisions of the False Claims Act.

3. Whether the 1986 amendments to the *qui tam* provisions of the False Claims Act apply retroactively to lawsuits based on conduct that occurred prior to 1986.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 6a-26a) is reported at 4 F.3d 417. The decisions of the district court (Pet. App. 32a-36a, 40a-51a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 1993. A petition for rehearing was denied on September 21, 1993. Pet. App. 2a-3a. On December 10, 1993, Justice Stevens ordered that the time for filing a petition for a writ of certiorari be extended to January 19, 1994. Pet. App. 1a. The petition for a writ of certiorari was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In November, 1984, and February, 1985, respondent TRW, Inc. provided representatives of the Department of Justice and the Department of Defense with reports of an internal investigation into certain accounting practices of its Compressor Components Division (CCD), which manufactured military jet engine components under subcontracts with several government prime contractors. The reports covered the period 1978-1984. They disclosed numerous irregularities in CCD's standard cost accounting system, which CCD had used to develop labor cost estimates for military subcontract proposals. Among the irregularities were the alteration or "padding" of CCD's standard cost routings, documents that contained step-by-step descriptions of how a part is manufactured and estimates of the amount of time each manufacturing step requires. Pet. App. 8a, 48a.

In December, 1984, the United States Attorney for the Northern District of Ohio opened a criminal investigation into TRW's disclosures. The investigation concluded in August, 1988, after TRW and five former CCD employees, including petitioner Eagleye, pleaded guilty to various criminal charges. Petitioner pleaded guilty to a one-count information charging him with conspiracy to defraud the United States, in violation of 18 U.S.C. 371. TRW pleaded guilty to each of three counts of a criminal information charging it with conspiracy to defraud the United States in violation of 18 U.S.C. 371. All three counts were based on the disclosures made by TRW in November, 1984. Pet. App. 9a.

2. Petitioner and a number of co-relators filed the first of the instant suits (*Eagleye I*), in April, 1986, under the *qui tam* provisions of the False Claims Act, 31 U.S.C. 3730(b) (1982). The suit alleged that TRW and

other defendants had participated in several conspiracies that resulted in the presentation of false claims for payment to the United States. Pursuant to 31 U.S.C. 3730(b)(2) and (3) (1982),[1] the government entered its appearance and assumed control of the litigation. Pet. App. 10a-11a. In an amended complaint, the government named TRW as the sole defendant and realleged only one of the violations of the False Claims Act—that involving CCD's alterations of its standard cost routings—that originally had been pleaded by petitioner. *Id.* at 11a.

In October, 1986, nearly seven months after petitioner filed his complaint in *Eagleye I*, Congress amended the False Claims Act. False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (Oct. 27, 1986), now codified at 31 U.S.C. 3729-3733 (1988). Among the amendments were revisions to the *qui tam* provisions of the Act, which expanded the circumstances under which citizens could bring suit on behalf of the government, participate in the litigation, and recover a share of any settlement or judgment. See Pet. App. 10a.

In March, 1989, the government moved to dismiss petitioner and the other relators from the case on three alternative grounds. The government's principal contention was that the relators' standing should be determined under the *qui tam* provisions in effect at the time suit was filed. The government argued that, under 31 U.S.C. 3730(b)(4) and (c)(1) (1982), petitioner lacked

[1] Section 3730(b)(2) provided in pertinent part that "[t]he Government may proceed with [a *qui tam*] action by entering an appearance by the 60th day after being notified [of the filing of the action]." Section 31 U.S.C. 3730(b)(3) (1982) provided:

> If the Government proceeds with the action, the action is conducted only by the Government. The Government is not bound by an act of the person bringing the action.

standing because the allegations in petitioner's complaint that were incorporated by the government in its first amended complaint were based on evidence or information the government already possessed when the action was filed.[2] In support of its contention, the government filed *in camera* and under seal the November, 1984, and February, 1985, reports of TRW's internal investigation, as well as an affidavit from the Assistant United States Attorney who conducted the grand jury's investigation of TRW's disclosures. Pet. App. 47a-48a.

In June, 1989, the district court denied a motion by the relators to have their standing determined under the 1986 amendments to the False Claims Act, holding that "the *qui tam* provisions in effect at the time the litigation was filed prevail and that the 1986 provisions do not apply." Pet. App. 95a. In November, 1990, the district court granted the government's motion to dismiss on the grounds that the allegations in the original complaint that were adopted by the government in its amended complaints were based on evidence and information already in the government's possession at the time the suit was filed. The court accordingly held that 31 U.S.C.

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[2] 31 U.S.C. 3730(b)(4) (1982) provided:

> Unless the Government proceeds with the action, the court shall dismiss an action brought by the person on discovering the action is based on evidence or information the Government had when the action was brought.

31 U.S.C. 3730(c)(1) (1982) provided:

> If the Government proceeds with an action, the person bringing the action may receive an amount the court decides is reasonable for disclosing evidence or information the Government did not have when the action was brought. The amount may not be more than 10 percent of the proceeds of the action or settlement of a claim and shall be paid out of those proceeds.

3730(b)(4) and (c)(1) (1982) barred petitioner and the others from sharing in any monetary recovery that might be obtained in the action. Pet. App. 40a-51a.

3. Meanwhile, in August, 1987, petitioner had filed a second action against TRW and General Electric Company under the 1986 amendments to the False Claims Act (*Eagleye II*). In his complaint, petitioner realleged the claims against TRW and GE that he had earlier alleged in the *Eagleye I* complaint or during his interviews with the government after *Eagleye I* was filed. Pet. App. 23a; Gov't C.A. Br. 16 n.10.

The government entered its appearance in *Eagleye II*, and moved to dismiss petitioner from the action on the grounds that (1) the suit was based on allegations or transactions that were already the subject of *Eagleye I*, in violation of 31 U.S.C. 3730(e)(3) (1988);[3] and (2) the filing of the complaint was in direct violation of a July 31, 1986, stipulation and order that all parties, including petitioner, had signed in *Eagleye I*. In its motion papers, the government also included a notice of dismissal pursuant to Fed. R. Civ. P. 41(a)(1). Pet. App. 23a.

The district court granted the motion to dismiss, although for reasons other than those urged by the government. The court held that the 1986 amendments to the False Claims Act, including amendments to the *qui tam* provisions of the Act, could not be applied in an action involving conduct that occurred before the amendments were enacted. Accordingly, the court considered the government's motion under the provisions of 31 U.S.C. 3730(b)(1) and (3) (1982).[4] The court found that the

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[3] For the text of that provision, see note 6, *infra*.

[4] 31 U.S.C. 3730(b)(3) (1982) provided that "[i]f the Government proceeds with the action, the action is conducted only by the Government. The Government is not bound by any act of the

requirements for dismissal were satisfied and gave its consent to the dismissal. Pet. App. 24a; see *id.* at 32a-36a.

4. The court of appeals affirmed both decisions. Pet. App. 6a-26a. The Sixth Circuit first held that the 1986 amendments to the False Claims Act did not apply to either *Eagleye I* or *Eagleye II* because, in the court's view, the amendments should be applied only to cases based on conduct that occurred after they were enacted. Pet. App. 13a-18a, 25a.

With respect to *Eagleye I*, the court held that although the district court had stated it was granting the government's "motion to dismiss," the order should be construed as a grant of summary judgment against petitioner's claim to recover a fee under 31 U.S.C. 3730(c)(1) (1982) for bringing the action. Pet. App. 19a, 21a. The court observed that the undisputed evidence showed that, before petitioner and the other relators filed their complaint, the government was in possession of sufficient evidence to conduct an adequate investigation of TRW's alleged fraud. *Id.* at 22a. In the court's view, that fact alone precluded award of a fee under 31 U.S.C. 3730(c)(1) (1982). Pet. App. 22a-23a.

The court of appeals also held that the district court had properly dismissed *Eagleye II* under the pre-amendment version of the Act. Pet. App. 23a-25a. Relying on 31 U.S.C. 3730(b)(1) and (3) (1982), the court held that, once the government intervened in a *qui tam* action, it had authority to dismiss the entire case, with the consent of the court. Accordingly, the court held that

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person bringing the action." 31 U.S.C. 3730(b)(1) (1982) provided that "[a]n action may be dismissed only if the court and the Attorney General give written consent and their reasons for consenting."

the district court did not have to hold a hearing or obtain the consent of petitioner and his co-relators before dismissing the action. Pet. App. 25a

ARGUMENT

1. Petitioner claims (Pet. 9-11) that the district court's partial reliance on sealed materials in disposing of *Eagleye I* violated the Due Process Clause. Petitioner did not raise that issue in the court of appeals, and it accordingly is not properly before this Court. *Singleton* v. *Wulff*, 428 U.S. 106, 120-121 (1976); *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In any event, the proceedings in this case did not violate the Due Process Clause. Petitioner appears to base his claim (Pet. 10) on the district court's refusal to allow him access to the two TRW reports of its internal investigation (which contained private commercial and financial information of TRW) and to the affidavit of the Assistant United States Attorney (AUSA) who conducted the government's criminal investigation (which contained information subject to the non-disclosure provisions of Rule 6(e), Fed. R. Crim. P.). The government submitted both the TRW reports and the affidavit *in camera* in support of its assertion that, at the time the relators filed their suit, the government already possessed sufficient information and evidence concerning TRW's fraud to bar them from sharing in the government's recovery under 31 U.S.C. 3730(c)(1) (1982) as a matter of law.

Initially, the question whether the district court properly referred to the sealed AUSA's affidavit is no longer of any importance in this case. Applying a *de novo* standard of review, see Pet. App. 19a, the court of appeals relied solely on the TRW reports to establish that the government had sufficient information at the time

petitioner brought this action to require a grant of summary judgment against petitioner. See *id.* at 22a. Accordingly, insofar as the district court may have relied in part on the AUSA's affidavit, that reliance was of no relevance to the decision in this case.

With respect to the use of the TRW reports that were submitted *in camera* to the district court, there was no violation of the Due Process Clause. This Court has frequently held that a district court may, when necessary, adjudicate a variety of issues based on sealed materials. See, *e.g.*, *United States* v. *R. Enterprises, Inc.*, 498 U.S. 292 (1991) (validity of grand jury subpoena); *United States* v. *Zolin*, 491 U.S. 554, 572 (1989) (validity of claim of attorney-client privilege). Thus, the mere fact that the court reviewed the TRW reports *in camera* does not in itself establish a due process violation.

Moreover, in this particular case the district court reasonably drew the balance between the need to protect confidential information and petitioner's need for disclosure. As the facts of this case demonstrate, the public has a strong interest in encouraging government contractors voluntarily to disclose their own wrongdoing to the government, even when doing so involves the disclosure of the contractor's confidential and proprietary information. The district court's action in protecting the confidentiality of the TRW reports clearly served that purpose. On the other hand, the *in camera* procedures here did not completely deprive petitioner of the opportunity to litigate his right to an informer's fee. The issue on which his right to an informer's fee turned was whether the basis for this case was information supplied by petitioner that the government had not already received from TRW's disclosures. Petitioner had ample opportunity to—and did—present evidence concerning the information he supplied to the government; access to

the contents of the TRW reports, which petitioner does not contest were in the hands of the government at the time he filed suit, was unnecessary for that purpose. The only function performed *in camera* was the comparison of petitioner's information with the TRW reports. Adoption of this procedure was reasonable in light of the need to encourage self-reporting of confidential information by companies like TRW.

2. Petitioner argues (Pet. 12-15) that the court of appeals erred in construing the 1982 version of the False Claims Act. He asserts that the court incorrectly held that the 1982 version of the Act precluded an award of an informer's fee to a *qui tam* plaintiff who brought a lawsuit "based on information and evidence in possession of the government at the time the action was filed," even if the government's information was not a "mirror image" of that in the hands of the *qui tam* plaintiff. Pet. App. 22a.

The Sixth Circuit's conclusion that an informer's fee could not be awarded when the government was aware of the basis of the suit is a reasonable interpretation of the language of 31 U.S.C. 3730(c)(1) (1982) and is consistent with the decision of the only other court of appeals that has considered the issue, *United States ex rel. Bayarsky* v. *Brooks*, 210 F.2d 257 (3d Cir. 1954), aff'g 110 F. Supp. 175 (D.N.J. 1953). Moreover, Section 3730(c)(1) (1982) was entirely rewritten when the False Claims Act was amended in 1986; as amended, the statutory standard for awarding an informer's fee in a *qui tam* case is substantially different from the "evidence or information the Government did not have when the action was brought" standard that the court of appeals construed in this case. See 31 U.S.C. 3730(d)(1) (1988). Especially in light of the six-year statute of limitations that applies to all claims under the 1982 Act, see 31 U.S.C. 3731(b) (1982), and to

most claims under the 1986 amendments, see 31 U.S.C. 3731(b)(1) (1988), further review is not warranted to consider whether the court of appeals correctly construed a now-superseded statutory provision.

3. a. Finally, petitioner urges this Court (Pet. 16) to review this case to determine whether the court of appeals properly held that the 1986 amendments to the *qui tam* provisions of the False Claims Act could not be applied in *Eagleye II*, because the conduct at issue occurred prior to the enactment of the amendments.[5] The United States argued in both courts below that the district court should have applied the *qui tam* provisions in effect at the time the suit was filed, and that *Eagleye II*, which was filed in 1987, was properly dismissed under those amended provisions. Nonetheless, further review is not warranted to determine whether the court of appeals correctly determined that the 1986 amendments to the False Claims Act should not be applied retroactively.

The issue on which certiorari is sought concerns the extent to which certain amendments to the False Claims Act passed eight years ago should be applied retroactively to suits based on conduct that occurred prior to that date. There is no conflict in the circuits concerning the retroactive application of the particular provisions at issue in this case, and that question is of little continuing importance. As mentioned above, the 1982 version of the Act contained a 6-year statute of limitations, 31 U.S.C. 3731(b) (1982), and the amended Act has a six-year limitations period applicable to most cases, with an absolute limitations period of ten years. See 31 U.S.C. 3731(b) (1988). Accordingly, there will be few or no additional cases brought based on pre-1986 conduct, and

[5] Petitioner does not challenge the court of appeals' decision to apply the 1982 version of the statute in *Eagleye I*. See Pet. 16.

the court of appeals' retroactivity ruling will have little continuing effect.

In any event, petitioner's claim in *Eagleye II* was not viable, regardless of which version of the False Claims Act is held applicable. As the courts below held, under the 1982 version of the Act, *Eagleye II* was properly dismissed upon the written consent of the government and the district court, pursuant to 31 U.S.C. 3730(b)(1) (1982); petitioner does not now dispute that conclusion. The same result, however, obtains if the amended version of the Act were to be applied. Under further amendments to the statute that were enacted in 1988, "[i]f the person bringing the action is convicted of criminal conduct arising from his or her role in the violation [of the False Claims Act], that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action." 31 U.S.C. 3730(d)(3). See Major Fraud Act of 1988, Pub. L. No. 100-700, § 9, 102 Stat. 4638. If the 1986 amendments had retroactive application, so presumably did the 1988 amendments. Petitioner was convicted of conspiring to defraud the United States arising from his role in the fraudulent practices at issue in this case. Accordingly, petitioner's claim in *Eagleye II* would have to be dismissed even if the 1986 amendments applied.

Moreover, on July 31, 1986, the parties to the *Eagleye I* litigation—including petitioner—entered into a stipulation that provided, *inter alia*, that "[t]he original complaint [in *Eagleye I*] shall not be the basis for any further proceedings by [petitioner] in this action or for any separate action brought or pursued by [petitioner]." Pet. App. 11a. That stipulation by its terms barred petitioner from filing the complaint in *Eagleye II*. That conclusion is further reinforced by two provisions of the amended False Claims Act that prohibit actions that are "based

upon allegations or transactions which are the subject of a civil suit * * * in which the Government is already a party," 31 U.S.C. 3730(e)(3),[6] and that provide that, once a *qui tam* action is brought, "no person other than the Government may * * * bring a related action based on the facts underlying the pending action," 31 U.S.C. 3730(b)(5).[7] The allegations in *Eagleye II* were either identical or substantially related to those made by petitioner and other relators in *Eagleye I*. Accordingly, petitioner's claim in *Eagleye II* was not viable, even if the amended False Claims Act were held applicable to this case.

b. Currently pending before this Court are two consolidated cases raising questions concerning the retroactivity of Sections 101 and 102 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. *Landgraf* v. *USI Film Products* and *Rivers* v. *Roadway Express*, Nos. 92-757 and 92-938 (argued Oct. 13, 1993). Section 101 amended 42 U.S.C. 1981 by providing that the phrase "make and enforce contracts" in that statute included "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 105 Stat. 1072. Section 102 amended Title VII of the Civil Rights Act of 1964 to allow victims of

[6] 31 U.S.C. 3730(e)(3) provides that:

> In no event may a person bring [a *qui tam* action] which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

[7] 31 U.S.C. 3730(b)(5) provides that:

> When a person brings [a *qui tam* action], no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

discrimination to seek compensatory and punitive damages, in addition to backpay, and to permit either party to a Title VII case to seek a jury trial if such damages are sought. 105 Stat. 1072.

The decision in *Landgraf* is unlikely to have an impact on the outcome of this case. As we explain above, petitioner's claims in *Eagleye II*—the only claims to which petitioner now asserts the amended version of the Act should have been applied—were plainly barred for a variety of reasons under the 1982, 1986, and 1988 versions of the statute. Moreover, the provisions of the Civil Rights Act of 1991 at issue in *Landgraf* differ substantially from the provisions of the False Claims Act at issue here. We therefore believe that it would be appropriate simply to deny the petition for a writ of certiorari in this case. In the alternative, however, the Court may wish to hold this case pending its decision in *Landgraf*.

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the Court may wish to hold this case pending its decision in *Landgraf* v. *USI Film Products* and *Rivers* v. *Roadway Express*, Nos. 92-757 and 92-938, and then to dispose of it accordingly.

Respectfully submitted.

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